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3 **UNITED STATES DISTRICT COURT**
4 **DISTRICT OF NEVADA**

5 * * *

6 KENNETH FRIEDMAN,

7 Plaintiff,

8 v.

9 ELISSA LUZAICH et al.,

10 Defendants.
11

Case No. 2:19-cv-00705-APG-BNW

Order

12 Presently before the Court is plaintiff Kenneth Friedman’s civil rights complaint (ECF No.
13 1) and motion to extend the time for service (ECF No. 5). The Court has screened Friedman’s
14 complaint, pursuant to 28 U.S.C. § 1915A(a). Friedman alleges that defendants violated his
15 rights under the United States Constitution and, by extension, 42 U.S.C. § 1983. Based on the
16 Court’s construction of Friedman’s complaint, Friedman’s allegations, if proven true, necessarily
17 undermine the validity of his state court conviction. Therefore, the Court will order that
18 Friedman’s complaint be dismissed without prejudice, but with leave to amend by March 9, 2020.

19 **I. Background.**

20 Friedman was convicted of state law crimes and he is currently an inmate in the custody
21 of the Nevada Department of Corrections (“NDOC”). (ECF No 1 at 4.) He alleges that
22 defendants Elissa Luzaich, April Gagen, and Cassie Leffner violated his rights under the First,
23 Fifth, and Fourteenth Amendments to the United States Constitution. (ECF No. 1 at 4–8.)
24 Consequently, he asserts three counts under 42 U.S.C. § 1983. (*Id.*)

25 In Count I, Friedman alleges that defendants interfered with his ability to establish facts
26 that would have proved his “actual innocence.” (*Id.* at 4.) Friedman claims that Gagen had
27 initially agreed to cooperate and provide sworn statements favorable to Friedman’s defense. (*Id.*)
28 However, Leffner—a law enforcement officer—supposedly contacted Gagen and convinced her

1 to stop cooperating. (*Id.*) This, in turn, prevented Friedman from acquiring exculpatory
2 information relevant to his defense. (*Id.* at 5.)

3 Friedman’s allegations in Count II and III also relate to defendants’ supposed acts of
4 witness tampering. Friedman claims that for his defense, he intended to rely heavily upon the
5 favorable testimony of two witnesses that he names “L” and “P.” (*Id.* at 6.) Friedman alleges
6 that Luzaich—a deputy district attorney—Leffner, and now Gagen contacted “L” and “P” and
7 dissuaded them from providing testimony favorable to Friedman’s defense. (*Id.*) According to
8 Friedman, “L” and “P” suffered humiliation by the defendants for “being for Friedman.” (*Id.* at
9 7.) Friedman claims that the jurors in the state criminal action have said that the testimony of “L”
10 and “P” would have made them alter their verdicts in Friedman’s case. (*Id.* at 4.) In addition to
11 “L” and “P,” Friedman alleges that several other defense witnesses “inexplicably” stopped
12 responding to Friedman’s defense efforts. (*Id.* at 7.)

13 In Count III, Friedman claims that defendants’ actions flow from the customs, practices,
14 and policies of Clark County. (*Id.* at 8.)

15 **II. SCREENING**

16 Courts must conduct a preliminary screening in any case in which a prisoner seeks redress
17 from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C.
18 § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims
19 that are frivolous or malicious, fail to state a claim upon which relief may be granted, or seek
20 monetary relief from a defendant who is immune from such relief. *See* 28 U.S.C. § 1915A(b)(1),
21 (2). In addition to the screening requirements under § 1915A, the Prison Litigation Reform Act
22 requires a federal court to dismiss a prisoner’s claim if it “fails to state a claim on which relief
23 may be granted.” 28 U.S.C. § 1915(e)(2); *accord* Fed. R. Civ. Proc. 12(b)(6).

24 Dismissal for failure to state a claim under § 1915(e)(2) incorporates the standard for
25 failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Watison v. Carter*, 668
26 F.3d 1108, 1112 (9th Cir. 2012). To survive § 1915 review, a complaint must “contain sufficient
27 factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *See*
28 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The court liberally construes pro se complaints and

1 may only dismiss them “if it appears beyond doubt that the plaintiff can prove no set of facts in
2 support of his claim which would entitle him to relief.” *Nordstrom v. Ryan*, 762 F.3d 903, 908
3 (9th Cir. 2014) (quoting *Iqbal*, 556 U.S. at 678).

4 In considering whether the complaint is sufficient to state a claim, all allegations of
5 material fact are taken as true and construed in the light most favorable to the plaintiff. *Wylar*
6 *Summit P’ship v. Turner Broad. Sys. Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted).
7 Although the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff
8 must provide more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S.
9 544, 555 (2007). A formulaic recitation of the elements of a cause of action is insufficient. *Id.*
10 Unless it is clear the complaint’s deficiencies could not be cured through amendment, a pro se
11 plaintiff should be given leave to amend the complaint with notice regarding the complaint’s
12 deficiencies. *Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

13 Here, Friedman seeks damages under 42 U.S.C. § 1983 for violation of his constitutional
14 rights in the state court criminal proceedings. If a § 1983 case seeking damages alleges
15 constitutional violations that would necessarily imply the invalidity of a conviction or sentence,
16 the prisoner must establish that the underlying conviction or sentence has been invalidated on
17 appeal, by habeas petition, or through a similar proceeding. *See Heck v. Humphrey*, 512 U.S.
18 477, 483-87 (1994). For example, the plaintiff in *heck* asserted claims of unlawful arrest, false
19 imprisonment, and prosecutorial misconduct. *Id.* at 478–79. If the plaintiff cannot demonstrate
20 that the underlying conviction or sentence has already been invalidated, then “the complaint must
21 be dismissed.” *See Whitaker v. Garcetti*, 486 F.3d 572, 581 (9th Cir. 2007) (citing *Heck*, 512
22 U.S. at 114).

23 The Court construes Friedman’s complaint to directly attack the validity of his criminal
24 conviction. In fact, he states very clearly that defendants’ actions precluded him from
25 establishing facts that would have proved his “actual innocence.” (ECF No. 1 at 4.) Friedman
26 does not allege that his conviction or sentence has been reversed or otherwise invalidated. Given
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28

1 that Friedman's claims necessarily imply the invalidity of his conviction or sentence, the Court
2 will order that Friedman's complaint be dismissed, but with leave to amend.¹

3 If Friedman desires to file a new complaint, he must do so by March 9, 2020. Should
4 Friedman choose to file an amended complaint, it would be helpful for the Court if he provided a
5 timeline for the Court to follow. The timeline should include, if possible, the date of his
6 conviction in state court and the date of any subsequent proceedings, including habeas.

7 **III. CONCLUSION**

8 IT IS THEREFORE ORDERED that Friedman's complaint be DISMISSED without
9 prejudice, but with leave to amend. If Friedman desires to file an amended complaint, he must do
10 so by March 9, 2020.

11 IT IS FURTHER ORDERED that Friedman's motion to extend the time for service (ECF
12 No. 5) is DENIED without prejudice. Friedman is instructed to file a new motion once the Court
13 has reviewed his forthcoming amended complaint.

14 DATED: February 19, 2020.

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16 BREND A WEKSLER
17 UNITED STATES MAGISTRATE JUDGE
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27 ¹ Given the Court's order that Friedman's complaint be dismissed without prejudice, the
28 Court will deny, without prejudice, Friedman's motion to extend the time for service. Friedman is
instructed to file a new motion once the Court screens his amended complaint.